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No. 06-1680

IN THE

Supreme Court of the United States

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

vs.

DANIEL SIEBERT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), this Court addressed the question "whether a state postconviction petition rejected by the state court as untimely nonetheless is 'properly filed' within the meaning of [28 U. S. C.] § 2244(d)(2)," so as to toll the AEDPA statute of limitations, and the Court decided it was not. The present case raises the following question:

Is *Pace* inapplicable to a state's time limitation merely because that limitation has an exception requiring a judicial determination before a petition is rejected as untimely?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to partici-

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and McGeorge School of Law student Kayvan Hazemi, and not by counsel for any party. No outside monetary contributions were made to the preparation or submission of this brief.

pate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Eleventh Circuit's decision in this case is tantamount to a judicial repeal of AEDPA's statute of limitations in any state where time limitations have any exceptions or flexibility built into them. In such states, prisoners would be able to grant themselves unlimited extensions merely by filing obviously untimely state collateral petitions. Such a frustration of the purpose of the statute of limitations is contrary to the interests CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Siebert was tried and found guilty of capital murder in two separate prosecutions. In Talladega County on April 17, 1987, he was sentenced to death for the capital murder of Linda Jarman. *Siebert* v. *State*, 562 So. 2d 586 (Ala. Crim. App. 1989). In Lee County on August 19, 1987, he was sentenced to death for the murder of her neighbors, Sherri, Joseph, and Chad Weathers. *Siebert* v. *State*, 555 So. 2d 772 (Ala. Crim. App. 1989). The Supreme Court of Alabama denied certiorari in both cases and issued certificates of final judgment on May 22, 1990, and January 3, 1990. *Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990); *Ex parte Siebert*, 555 So. 2d 780 (Ala. 1989). This Court denied certiorari on November 5, 1990, and June 28, 1990, respectively.

Siebert v. *Alabama*, 498 U. S. 963 (1990); *Siebert* v. *Alabama*, 497 U. S. 1032 (1990).

Siebert filed two state petitions for postconviction relief pursuant to Rule 32 of Alabama Rules of Criminal Procedure in Talladega County on August 25, 1992, and in Lee County on June 30, 1992. *Siebert* v. *State*, 778 So. 2d 842, 846 (Ala. Crim. App. 1999). Rule 32 states that "[t]he court shall not entertain any petition for relief . . . unless the petition is filed . . . within two (2) years after the issuance of the certificate of judgment . . . ." Ala. Rule Crim. Proc. 32.2(c). The two petitions, filed after the two-year limitations period, were consolidated and rejected as "untimely." The timeliness portion of the circuit court decision is reproduced in the Appendix to this brief. The Court of Criminal Appeals affirmed, 778 So. 2d, at 849. The Supreme Court denied certiorari. *Ex parte Siebert*, 778 So. 2d 857 (Ala. 2000). The Alabama Supreme Court included a reminder that denial of certiorari does not imply endorsement of the lower court's opinion in its entirety. See *id.*, at 857. A concurring opinion explains that there is no doubt about the holding at issue here, though.

> "[T]he result reached by the Court of Criminal Appeals in this case is entirely justifiable on the ground that the defendant's Rule 32, Ala. R. Crim. P. petition was filed after the two-year deadline without any proof of an excuse that might warrant an extension of the deadline pursuant to Rule 1.3(b), Ala. R. Crim. P." *Ibid.* (Johnstone, J., concurring specially).

Siebert filed two federal habeas petitions on September 14, 2001, 364 days after the Supreme Court of Alabama denied certiorari for his state petition. He challenged his sentence for the murder of Ms. Jarman, the Talladega County case, in the Northern District. He challenged his sentence for the Weathers family

murders, the Lee County case, in the Middle District. Both courts granted the respondent's motion to dismiss on statute of limitations grounds. *Siebert* v. *Haley*, 193 F. Supp. 2d 1260, 1272 (MD Ala. 2002); *Siebert* v. *Haley*, No. 01-J-2323-E (ND Ala. 2002), App. to Pet. for Cert. 2a, 23a. The Eleventh Circuit decided the appeals from these two decisions in a single opinion. See *Siebert* v. *Campbell*, 334 F. 3d 1018 (2003).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year period of limitation on federal habeas petitions. 28 U. S. C. § 2244(d)(1). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U. S. C. § 2244(d)(2). As in other pre-AEDPA cases, Siebert had until April 23, 1997, to file a timely federal habeas petition unless tolling extended that time. See *Carey* v. *Saffold*, 536 U. S. 214, 217 (2002). Thus, the AEDPA bars Siebert's federal petition unless his Rule 32 petition was "properly filed" within the meaning of § 2244(d)(2) and tolled the one-year period of limitations between April 23, 1997, and September 15, 2000.

Citing Alabama's determination that Siebert's Rule 32 petition did not meet the state filing deadline, both district courts refused to toll the AEDPA limitations period. *Siebert* v. *Haley*, 193 F. Supp. 2d, at 1272; *Siebert* v. *Haley*, App. to Pet. for Cert. 23a. Reversing both decisions, the Eleventh Circuit Court of Appeals held that Alabama's timely filing requirement did not preclude the state petition from being " 'properly filed' within the meaning of § 2244(d)." *Siebert* v. *Campbell*, 334 F. 3d, at 1032, App. to Pet. for Cert. 47a.

On remand in the case of the Weathers family murders, the Middle District denied relief on the

ground of procedural default. *Siebert* v. *Campbell*, 2005 U. S. Dist. LEXIS 36136, 2005 WL 2456032 (MD Ala., Oct. 4, 2005). The Eleventh Circuit affirmed, *Siebert* v. *Campbell*, 455 F. 3d 1269 (2006), and this Court denied certiorari on March 19, 2007. *Siebert* v. *Allen*, No. 06-8808, 127 S. Ct. 1823, 167 L. Ed. 2d 331 (2007). This judgment is not at issue in the present petition.

While the present case, regarding the murder of Ms. Jarman, was pending on remand in the Northern District, this Court decided in *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), that "time limits, no matter their form, are 'filing' conditions." Following *Pace*, the District Court again dismissed the petition as falling outside the AEDPA's tolling provision. *Siebert* v. *Campbell*, No. 1:01-CV-2323-IPJ-TMP (ND Ala., Feb. 9, 2005), App. to Pet. for Cert. 66a. Siebert appealed again, and the Court of Appeals reversed and remanded the case with instructions for the lower court to rule on the merits. *Siebert* v. *Allen*, 480 F. 3d 1089 (CA11 2007) (*Siebert II*), App. to Pet. for Cert. 1a. The State timely filed the present petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision in this case is clearly contrary to this Court's precedents in *Carey* v. *Saffold* and *Pace* v. *DiGuglielmo*. The time limitation in *Saffold* was not jurisdictional and involved the exercise of judicial judgment. Even so, this Court held that so long as the state court determined that the petition was untimely it would not toll the federal statute. *Pace* further rejected the notion that a quantum of judicial review removed a state time limit from the category of filing conditions.

This case meets the criteria for summary reversal. No new law needs to be made to decide it. The Court of Appeals' decision is obviously erroneous under *Saffold* and *Pace*.

ARGUMENT

I. The Eleventh Circuit's limitation of *Pace* is clearly contrary to both *Pace* itself and *Carey* v. *Saffold*.

A. Saffold.

If a state court clearly ruled that a state collateral review petition was untimely, "that would be the end of the matter," this Court held in *Carey* v. *Saffold*, 536 U. S. 214, 226 (2002). In its two opinions in the present case, *Siebert* v. *Campbell*, 334 F. 3d 1018 (CA11 2003) (*per curiam*) (*Siebert I*), and *Siebert* v. *Allen*, 480 F. 3d 1089 (CA11 2007) (*Siebert II*), the Eleventh Circuit held that does *not* end the matter. Instead, the federal court must inquire further into such questions as whether the time limitation is jurisdictional, whether its status was clearly established, whether it operates as an affirmative defense, and whether it involves the exercise of discretion. See 334 F. 3d , at 1025, 1027; 480 F. 3d, at 1090. In so holding, the decision was contrary to *Saffold*, where the time limitation was plainly not jurisdictional. Indeed, the time limit at issue in *Saffold* was not a statutory limit at all, but rather a creation of case law. See *In re Clark*, 5 Cal. 4th 750, 782-783, 855 P. 2d 729, 750-751 (1993).

The Eleventh Circuit correctly stated that "the application of AEDPA's tolling provision is a comparatively straightforward enterprise predicated on the plain meaning of the phrase 'properly filed.' " *Siebert I*, 334 F. 3d, at 1032. However, the Court failed to notice

that "compliance with the applicable rules and laws governing filings" is "quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz* v. *Bennett*, 531 U. S. 4, 8-9 (2000) (emphasis omitted). Only by ignoring the plain meaning of the phrase could the Court go on to hold that Siebert's failure to comply with Alabama's timely filing requirement "did not render his post-conviction applications improperly filed." 334 F. 3d, at 1032. The Eleventh Circuit justified its holding on the premise that "a sufficient quantum of judicial review . . . effectively ratif[ies] the form and manner of filing." *Ibid.* This holding is contrary to this Court's opinion in *Carey* v. *Saffold*.

In *Saffold*, this Court rejected the Ninth Circuit's suggestion that the California Supreme Court's consideration of the merits meant that it "could not have considered [Saffold's] petition too late." 536 U. S., at 225. California employs a "flexible, discretionary timeliness standard" on habeas appeals, which necessarily involves the exercise of judicial discretion. See *Evans* v. *Chavis*, 546 U. S. 189, 203 (2006) (Stevens, J., concurring). On an appeal from the denial of statutory tolling, the Ninth Circuit reversed, insisting that treatment of the merits "in the course of determining whether an untimeliness bar should apply" involved the same tolling concerns as a direct review of the merits. *Saffold* v. *Newland*, 250 F. 3d 1262, 1267 (CA9 2001). Like the Eleventh Circuit in the present case, the Ninth Circuit missed the point. "[I]t is the State's interests that the tolling provision seeks to protect . . . ." *Saffold*, 536 U. S., at 223. Where the principles of comity, finality, and federalism are concerned, there is no "critical difference" between a mandatory time limit and the "indeterminate" timeliness rule of California's "general 'reasonableness' standard." *Id.*, at 222. Both are laws that govern when an application is properly

filed. Disregarding the existence of a timely filing requirement merely because it is discretionary, and then using the existence of that discretion to imply that the petition was properly filed, "risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." *Id.*, at 226. Since, where the inquiry is whether the petition is in compliance with "the applicable laws and rules governing filings," *Artuz*, 531 U. S., at 8, it makes little sense to differentiate between a mandatory time bar and a timely filing requirement involving some "quantum of judicial review." If the State ultimately determines that the application was filed late, it is "the end of the matter." *Saffold*, *supra*, at 226.

In the course of expanding AEDPA's tolling for "properly filed" petitions to those barred by nonjurisdictional time limits, *Siebert I* took an astonishing leap. The Eleventh Circuit imported wholesale into the law of AEDPA one of the most confused and tangled aspects of pre-AEDPA habeas law, the requirement that state rules be " 'firmly established and regularly followed' " to qualify as adequate state grounds under the procedural default doctrine. See 334 F. 3d, at 1025. This area of law is, to put it bluntly, a mess. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 5-10, available at http://www.cjlf.org/pdf/Lee.pdf. The goal of Congress in enacting AEDPA was to streamline habeas litigation. The notion that Congress intended to incorporate a doctrine that has produced protracted litigation on collateral issues, see, *e.g.*, *Bennett* v. *Mueller*, 322 F. 3d 573 (CA9 2003), would require exceptionally compelling justification. *Siebert I* provides no justification, and the holding cannot be squared with *Saffold*'s "end of the matter" language. In the procedural default area, a clear state holding that a claim is barred is not the end

of the matter but only the beginning of a new round of litigation. *Saffold* indicated that no new round follows a clear state holding of untimeliness. In *Saffold*, the Ninth Circuit had similarly imported procedural default law into a statute of limitation case, holding that the entanglement of the timeliness ruling with the merits meant the ruling lacked independence of federal law. *Saffold*, 250 F. 3d, at 1267. This Court specifically rejected this holding, stating that the clear state-court holding ended the matter "*regardless* of . . . whether its timeliness ruling was 'entangled' with the merits. 250 F. 3d, at 1267." 536 U. S., at 226 (emphasis added). Even before *Pace*, *Siebert I* was clearly contrary to this Court's precedent.

B. Pace.

Decided between *Siebert I* and *Siebert II*, *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005), held that state petitions that fail to meet state time limits are, necessarily, improperly filed, and that the existence of exceptions to such time limit offers "no grounds" for treating the petitions differently. *Id.*, at 413 ("a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more 'properly filed' than a petition filed after a time limit that permits no exception"). For practical purposes, a petitioner who files a state petition after a fixed time limit is no less entitled to statutory tolling than a petitioner whose late filing is discovered through a more involved inquiry. Since neither petition complied with "the applicable laws and rules governing filings," neither petition should toll the statute of limitations. Because a timely filing requirement necessarily governs when an application's filing is proper, it must be a "condition to filing," no matter its form. *Ibid.* "What we intimated in *Saffold* we now hold: When a postconviction petition is

untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.*, at 414.

Pace clarified once more that the guide to identifying filing conditions was common usage and common understanding. *Id.*, at 413. In *Siebert II*, the Eleventh Circuit again refused to heed this Court, reversing the District Court's post-*Pace* decision without analysis. In *Siebert I*, the court had indicated what it thought was "most relevant in [its] 'properly filed' inquiry: untimeliness did not mandate a petition's dismissal, but rather was a matter within the court's discretion to ignore." 334 F. 3d, at 1028. The court felt that the discretion left to the State court "compels the conclusion that timeliness was not a prerequisite to filing per se." *Id.*, at 1030. Hence, compliance with the "applicable laws and rules governing filing" was unnecessary, so long as a "quantum of judicial review" was involved rejecting the petition. *Ibid.* However, filing fees and jurisdictional matters that are prerequisites to filing "often necessitate judicial scrutiny" as well. *Pace*, *supra*, at 414.

Pace reiterated that "*Artuz* itself distinguished between time limits and procedural bars." 544 U. S., at 417. "[T]here is an obvious distinction" here. *Ibid.* A time limit is necessarily one of "the applicable laws and rules governing filings." *Artuz*, 531 U. S., at 8. On the other hand, procedural bars, like the ones at issue in *Artuz*, say little about how, when, or where an application is to be filed. *Artuz*'s single reference to a "condition to obtaining relief" only says that the state procedural bars at issue in the case had no indications of being classified by the State as filing conditions. To say that "they have been properly delivered and accepted so long as the filing conditions have been met," *id.*, at 11, is only to reiterate the simple fact that "filing conditions" are "the applicable laws and rules governing

filings." *Id.*, at 8. To give a district court the authority to toll the statute of limitations merely because a state court considers, but ultimately rejects, the allegation that an application is in compliance with the applicable laws and rules governing filings would do little to encourage the timely pursuit of relief, while simultaneously undermining the "well-recognized interest in the finality of state court judgments." *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001). Indeed, to do so on the basis of some "quantum of judicial review" would turn practically every discretionary aspect of the rules and laws governing filings into "a *de facto* extension mechanism, quite contrary to the purpose of AEDPA." *Pace*, 544 U. S., at 413.

II. Siebert's state petition was not properly filed and hence the limitation period was not tolled.

In *Siebert I*, the Eleventh Circuit made great efforts to show that Alabama's timeliness requirement was not a "filing condition" because it was discretionary and not jurisdictional in nature. *Siebert* v. *Campbell*, 334 F. 3d 1018, 1026-1027 (CA11 2003) ("Neither the circuit court's explicit merits determinations nor the court of criminal appeals' own evidence-related aside are consistent with a determination that jurisdiction was lacking"). This opinion is far removed from the state court's interpretation of Alabama's timely filing requirements.

The Eleventh Circuit would require that, to show that a timeliness rule is a filing condition, a state court "refrain from adjudicating the merits of the claims raised in . . . untimely petitions." *Siebert I*, 334 F. 3d, at 1029. However, as this Court had earlier recognized in *Carey* v. *Saffold*, 536 U. S. 214, 225-226 (2002), a

court may address the merits of a claim that is otherwise barred for many reasons. "[F]or instance . . . where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief." *Ibid.* It is not for federal courts to impose such requirements on state courts by otherwise tolling the AEDPA period of limitations. *Evans* v. *Chavis*, 546 U. S. 189, 207 (2006) (Stevens, J., concurring) ("if the state court's untimeliness ruling is clear, that would be the end of the matter, even if the court had also ruled on the merits").

Furthermore, the Alabama Circuit Court explicitly stated that treatment of the merits did not mean that the court was exercising its jurisdiction. "Siebert's petitions are due to be dismissed as being untimely filed beyond the applicable statute of limitations and therefore insufficient to invoke the jurisdiction of this Court to hear the petitions on the merits." Appendix 5. The Court addressed the merits of Siebert's petition only in the alternative. In truth, *Siebert I* relies on the existence of a discretionary exception to Rule 32 that never existed. *Ex parte Siebert*, 778 So. 2d 857, 858 (Ala. 2000) (Johnstone, J., concurring) ("Whether this particular rule can authorize an extension of the two-year deadline for filing a Rule 32 petition has not been previously decided by either the Court of Criminal Appeals or this Court"). See also *Siebert* v. *State*, 778 So. 2d 842, 850 (Ala. Crim. App. 1999) ("Moreover, we note that Rule 1.3(b) specifically prohibits extending the time for a motion for new trial, for filing an appeal, or for a motion for a judgment of acquittal pursuant to Rule 20—all postconviction proceedings, like a Rule 32 petition"). *Siebert II*, upholding the earlier decision, establishes a dangerously broad precedent for federal interference with state court judgments, implicitly deciding for itself the timeliness of a petition that had

already been deemed untimely by the state. It is based on a phantom of state discretion, non-existent in truth and unemployed in fact. Siebert's petition was late when he filed it. He did not meet the exception of Rule 1.3(b) of Alabama Rules of Criminal Procedure. 778 So. 2d, at 849. He is not entitled to statutory tolling.

III. Summary reversal is appropriate in this case.

Summary reversal is appropriate where the decision below is legally erroneous and the error is obvious. See *Gonzales* v. *Thomas*, 547 U. S. 183, 185 (2006) (*per curiam*). For the reasons stated above, this is such a case. The Court has previously "exercise[d] [its] summary reversal procedure . . . to correct a clear misapprehension of the [controlling legal] standard." *Brosseau* v. *Haugen*, 543 U. S. 194, 198, n. 3 (2004) (*per curiam*).

Although *Saffold* and *Pace* were decided by narrowly divided courts, they are now established precedents. No new law needs to be made to decide the case. The Eleventh Circuit's decision is a "demonstrably erroneous application" of those precedents, see *Maryland* v. *Dyson*, 527 U. S. 465, 467, n. * (1999) (*per curiam*), and nothing else is required.[2]

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2. The doctrine of the law of the case, which the Court of Appeals relied on, *Siebert* v. *Allen*, 480 F. 3d 1089, 1090 (CA11 2007), App. to Pet. for Cert. 1a, has no application once the case reaches this Court on certiorari. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 816 (1988).

CONCLUSION

The petition for certiorari should be granted, the decision of the Court of Appeals for the Eleventh Circuit should be reversed, and the case should be remanded with directions to affirm the decision of the District Court.

September, 2007

Respectfully submitted,

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Criminal Justice Legal Foundation

APPENDIX

IN THE CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA

DANIEL SIEBERT,	)	
PETITIONER,	)	
V.	)	Case No. CV-92-319
STATE OF ALABAMA,	)	
RESPONDENT.	)	

MEMORANDUM OPINION

Based on the evidence presented at trial and the hearing on the Rule 32 petitions, the Court enters the following findings of fact and conclusion of law:

I. PROCEDURAL HISTORY

Siebert was indicted on two counts of capital murder. One indictment charged Siebert with the murders of Sherri Weathers, Joseph Weathers, and Chad Weathers. The other indictment charged Siebert with the death of Linda Jarman. Siebert was first tried in Talladega County (CC-86-300) under the indictment charging the capital murder of Linda Jarman. On March 19, 1987, Siebert was convicted of the capital murder of Linda Jarman. On March 20, 1987, the jury recommended a sentence of death. On April 17, 1987, this Court followed the jury's recommendation and sentenced Siebert to death.

Subsequently, Siebert was granted a change of venue for the indictment charging the capital murders of Sherri, Joseph, and Chad Weathers. Siebert's trial for the Weathers' murders was held in Lee County. (CC-87-371) This Court also presided over that case.

Siebert was convicted for capital murder of the Weathers' family on June 18, 1987. On the same day, the jury recommended that Siebert be sentenced to death. On August 19, 1987, this Court followed the jury's recommendation and sentenced Siebert to death.

After Siebert's Talladega and Lee County conviction and death sentence were affirmed on direct appeal, Siebert filed two Rule 32 petitions. The petition concerning the Linda Jarman case was filed on August, 24, 1992, in the Talladega County Circuit Court. The petition concerning the Weathers' case was filed on June 26, 1992, in Lee County Circuit Court. Because this Court presided over both the Talladega and Lee County trial, this Court transferred the Lee County Rule 32 (CC-87-371) petition to Talladega County so that it could be considered simultaneously with the Talladega County Rule 32 petition. (CC-86-300) This Court consolidated both petitions into one action to determine if Siebert is entitled to relief from conviction or sentence of death. (CV-92-319)

II. SIEBERT'S PETITIONS ARE DUE TO BE DISMISSED AS UNTIMELY FILED PURSUANT TO RULE 32.2(C) OF THE ALABAMA RULES OF CRIMINAL PROCEDURE.

Rule 32.2(c) of the Alabama Rules of Criminal Procedure specifically states that "That court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, A.R.App.P." (emphasis added) The petition in

former Talladega County case CC-86-300 was filed on or about August 24, 1992. The Alabama Court of Criminal Appeals in the former Talladega County case CC-86-300 issued the Certificate of Judgment on May 22, 1990. The petition in former Lee County case CC-87-371 was filed on or about June 25, 1992. The Alabama Court of Criminal Appeals in the former Lee County case CC-87-371 issued the Certificate of Judgment on January 30, 1990. Clearly, both petitions were filed outside the two-year statute of limitations.

Siebert asserts three grounds upon which this Court should hold that Siebert's petitions are not barred by the two-year statute of limitations: (1) The State waived the affirmative defense of the statute of limitations when it failed to raise it in its first responsive pleadings; (2) a direct appeal is not final until the United States Supreme Court denies certiorari; and, (3) any failure to timely file the petitions was the result of excusable neglect under Rule 1.3 (b), Ala.R.Crim.P. The Court will address each of these issues as follows:

A. The State Of Alabama Did Not Waive The Statute Of Limitations Defense By Failing To Raise It In Its First Responsive Pleading.

Siebert asserts that the State did not provide him notice of its intention to rely on the statute of limitations defense because the State failed to plead the defense in its initial response. After Siebert untimely filed both of his petitions, the State responded to the Talladega County petition on or about October 14, 1992. The State responded to the Lee County petition on or about July 27, 1992. The State did not assert a statute of limitations defense in either initial response. On or about March 28, 1998, Siebert filed an amendment to both of his Rule 32 petitions. Seven days later, on April

4, 1995, the State filed a response to both amended petitions asserting that the petitions were barred in their entirety by the two-year statute of limitations. The State's response placed Siebert on notice within seven days after Siebert filed his amended petitions. If Siebert can file amendments to his petition and have those amendments relate back to the original petition, the State can file an answer to those amendments and have it relate back to the original answer (the initial responsive pleading). Siebert had timely notice of the State's intention to rely on the statute of limitations defense and the State did not waive the statute of limitations defense.

B. The Statute Of Limitations Began To Run When The Court Of Criminal Appeals Issued The Certificate Of Judgment.

Siebert asserts that his convictions were not final until the United States Supreme Court denied his petition for certiorari on his Talladega County conviction on November 5, 1990, and his petition for certiorari on his Lee County conviction on June 28, 1990. Siebert asserts the statute of limitations did not begin to run until the United States Supreme Court denied certiorari on both of his petitions. Rule 32.2 (c) of the Alabama Rules of Criminal Procedure specifically states that this Court shall not entertain a petition for relief from conviction or sentence unless it is filed within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals. Rule 41(b) of the Alabama Rules of Appellate Procedure specifically states:

> The timely filing of a petition for certiorari in the supreme court shall stay the issuance of the certificate of judgment by the courts of appeals,

> which stay shall continue until the final disposition by the supreme court. Upon the filing of a copy of an order of the supreme court denying the petition for certiorari, the certificate of judgment of the courts of appeals shall issue immediately.

It is clear from Rule 32.2(c) of the Alabama Rules of Criminal Procedure and Rule 41(b) of the Alabama Rules of Appellate Procedure that Siebert's conviction was final on the date the Alabama Court of Criminal Appeals issued the certificate of judgment in both petitions. Therefore, this ground is without merit.

C. Siebert's Untimely Filing Of His Rule 32 Petitions Is Not The Result Of Excusable Neglect.

This Court holds that the untimely filing of Siebert's Rule 32 petitions is not the result of excusable neglect. This Court chooses not to entertain Siebert's Talladega County and Lee County Rule 32 petitions due to the untimely filing of both petitions.

Due to the untimely filing of both petitions, and the reasons stated above, Siebert's petitions are due to be dismissed as being untimely filed beyond the applicable statute of limitations and therefore insufficient to invoke the jurisdiction of this Court to hear the petitions on the merits. In the alternative, this Court finds Siebert's Talladega County and Lee County Rule 32 petitions do not support the relief he seeks because they are without merit.